87-2108

No. _____

In The

Supreme Court of the United States

October Term, 1988

The Blackfeet Indian Tribe,

Petitioner,

vs.

The Montana Power Company, a Montana Corporation;
the United States of America;
and Donald P. Hodel, Secretary of the Interior,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Secretary of the Interior exceeded his authority in granting natural gas transmission pipeline rights-of-way across tribal lands on the Blackfeet Reservation for fifty-year terms under the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323-328 where: 1) the Act of March 11, 1904, 38 Stat. 65, 25 U.S.C. 321, which is preserved by section 4 of the 1948 Act, provides for a maximum of twenty-year terms; and 2) the Blackfeet Tribe did not consent to fifty-year terms.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 24, 1988, and its Opinion entered on January 28, 1988.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit is reported at 838 F.2d 1055 (9th Cir. 1988), *rehearing denied* ___ F.2d ___ (March 21, 1988), and is reprinted at Appendix 1-10. The opinion of the United States District Court for the District of Montana is unpublished and is reprinted at Appendix 11-18.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1988, Appendix 19. A timely Petition for Rehearing was filed, and was denied on March 21, 1988, Appendix 20. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

The statutes involved are: Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. 321, reprinted at Appendix 21-22; and

Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323-328, reprinted at Appendix 23-24.

STATEMENT OF THE CASE

In 1904, Congress authorized the Secretary of the Interior to grant oil and gas pipeline rights-of-way through Indian reservations provided that "the rights herein granted shall not extend beyond a period of twenty years." Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. 321 (the 1904 Act).[1] The Act establishes specific terms and conditions for such grants.

In 1948, Congress empowered the Secretary "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe" over Indian lands. Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323 (the 1948 Act). Tribal consent and just compensation are required for such grants, 25 U.S.C. 324 and 325,[2] but no term of years or conditions for specific rights-of-way are provided in the 1948 Act. Section 4 of the 1948 Act provides:

> This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 [citations omitted], nor shall any existing statutory authority empowering the Secretary of the

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[1] The rights-of-way could be extended by the Secretary for another term not to exceed twenty years. *Id.*

[2] Tribal consent was not required in the 1904 Act, but are required after the enactment of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. 476.

> Interior to grant rights-of-way over Indian lands be repealed hereby.

25 U.S.C. 326. Thus, the existing right-of-way statutes, including the 1904 Act, were specifically preserved by Congress in the 1948 Act.

Until 1960, the Secretary's regulations provided for twenty-year maximum terms for oil and gas pipeline rights-of-way. *See e.g.* 25 C.F.R. 256.19 (1951). For the brief eight-year period between 1960 and 1968 the regulations were changed to provide for fifty-year maximum terms. *See* 25 C.F.R. 161.19 (1960). It was during this period that the rights-of-way at issue were granted. The regulations were revised in 1968 to again require twenty-year maximum terms for pipeline rights-of-way. 25 C.F.R. 161.25 (1968).[3] The 1968 regulations indicate that the twenty-year maximum term applies whether the right-of-way is granted under the 1904 Act or the 1948 Act. *Id.* The 1968 regulations are still in effect, but have been redesignated as Part 169. *See* 25 C.F.R. 169.25 (1987).

Between the years 1961 and 1969, the Secretary of the Interior granted to Montana Power Company five natural gas transmission pipeline rights-of-way across tribal

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[3] The regulations also contained a separate provision providing that oil and gas pipeline rights-of-way and other specified rights-of-way may be granted "without limitation as to term of years." 25 C.F.R. 161.18 (1968). *See* 25 C.F.R. 169.18 (1987). The relationship between this provision and 25 C.F.R. 161.25 is unclear since, as indicated above, 25 C.F.R. 161.25 provides that the maximum term is twenty-years whether the right-of-way is granted under the 1904 Act or the 1948 Act. There are no other statutes authorizing pipeline rights-of-way.

lands on the Blackfeet Indian Reservation. Each of the pipeline rights-of-way was approved by the Secretary pursuant to the 1948 Act for a term of fifty years.[4]

Until the Secretary approved the right-of-way grants, no term of years appears in any of the right-of-way documents. Although the Tribe consented to the rights-of-way, the tribal consents do not specify any term of years, nor do the right-of-way applications. Except for the 1961 pipeline application, there is nothing in the record which even indicates whether the rights-of-way were applied for under the 1904 Act or the 1948 Act. The term of years first appears on the right-of-way maps, where the notation is made that the rights-of-way were approved under the 1948 Act for fifty-year terms.

No monetary compensation was received by the Blackfeet Tribe for the rights-of-way at issue. Montana Power Company did agree in connection with the 1961 right-of-way to extend gas service to the towns of Browning and East Glacier on the Reservation, and agreed to purchase gas produced on the Reservation at a price equivalent to the highest price paid by Montana Power to

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[4] The pipeline granted in 1961 is a 16-inch line running from the Canadian border to Cut Bank, Montana, a distance of 55.9 miles across the Reservation, 23.3 miles of which is Indian trust land. A second pipeline granted in 1962 connects with the above line and crosses 36.4 miles of the Reservation, 14.4 miles of which is Indian trust land. The third line granted in 1965 is a 4-inch gathering line crossing the Reservation for 4.49 miles, 2.27 miles of which is Indian trust land. The fourth right-of-way was granted in 1963 and covers two 2-inch service lines which cross tribal lands for short distances. The fifth right-of-way was granted in 1969, and has not yet expired.

producers of gas of similar quality and quantity in Alberta, Canada. No compensation for the other rights-of-way at issue was provided.

On April 29, 1981, the Blackfeet Tribe notified Montana Power Company that its 1961 pipeline was about to expire, and of the necessity of an application for renewal and the negotiation of renewal terms. Montana Power disputed that the right-of-way had expired. The Tribe then filed suit against Montana Power, the United States and the Secretary of the Interior on December 16, 1983, alleging that various pipeline rights-of-way granted to Montana Power had expired and that Montana Power was therefore in trespass. Jurisdiction was alleged under 28 U.S.C. 1331 and 28 U.S.C. 1362.[5]

The parties filed cross motions for partial summary judgment on the right-of-way term issue. On November 24, 1986, the district court granted Montana Power Company's motion and denied the Tribe's motion. The Tribe moved for and was granted Rule 54(b) certification, and appealed to the Ninth Circuit Court of Appeals. The

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[5] In addition to the right-of-way term issue, the Tribe's complaint also made other claims: that Montana Power did not comply with its agreement to purchase gas at Canadian prices; and that Montana Power Company failed to properly account to the Tribe for royalties under leases between the Tribe and MPC, and that the Secretary breached its fiduciary duty by failing to require proper accounting. Subsequent audits by the Minerals Management Service of the Department of the Interior indicated that substantial underpayments had occurred. These claims were not part of the summary judgment motions and are the subject of potential settlement between the parties.

Ninth Circuit affirmed the District Court. The Court held that the term of years can be either 20 or 50 years, and found that "[s]ince the Tribe consented to the 50-year term, the Secretary's regulations with respect to term of years are valid." App. at 10.

REASONS FOR GRANTING THE WRIT

I. This Case Raises An Important Issue Concerning the Relationship of Specific Right-of-Way Statutes and the General Indian Right-of-Way Statute Which Has an Impact on the Negotiation and Granting of Rights-Of-Way on All Indian Reservations.

Substantial numbers of oil and gas pipelines cross Indian lands for the purpose of transporting hydrocarbons across, through and within Indian reservations. On the Blackfeet Reservation, there are over 35 such pipeline rights-of-way, many of which serve as the major means of transport of oil and gas from Canadian oil and gas fields and the Reservation. Every pipeline crossing Indian lands is potentially affected by the issue presented in this case, i.e. whether the maximum term for such pipelines is 20 years or 50 years. In addition, each new pipeline right-of-way which is granted across Indian lands will also be affected by the issue in this case.

Confusion as to right-of-way grants has been created because there are special statutes, like the 1904 Act, authorizing specific kinds of rights-of-way, and a general statute, the 1948 Act, authorizing rights-of-way for all purposes. In the case of pipeline rights-of-way, the 1904 Act specifies twenty-year maximum terms, while the 1948

Act is silent on the issue. The 1904 Act, however, is preserved by section 4 of the 1948 Act.[6] Thus regulations promulgated under the 1948 Act must be in harmony with the 1904 Act.

Since 1948, the Secretary's regulations have consistently provided that the maximum term for pipeline rights-of-way is twenty years, except for the period 1960-1968 when the rights-of-way at issue were granted. *See e.g.* 25 C.F.R. 256.19 (1951); 25 C.F.R. 161.25(a) and (b) (1960). *But see* 25 C.F.R. 161.19 (1960).[7] Since 1968, the maximum term for oil and gas pipelines has been twenty years whether the right-of-way is granted under the 1904 Act or the 1948 Act. Section 161.25(a) and (b), 25 C.F.R. (1968) provide:

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[6] By contrast, when Congress enacted the comprehensive Indian Mineral Leasing Act, Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. 396a-396g, to bring order to the confusion caused by the various statutes governing Indian mineral leasing, *see* F. Cohen, Handbook of Federal Indian Law (1982 ed.) 534-35, section 7 of the 1938 Act repealed all inconsistent acts.

[7] The provision provided:

161.19 Tenure of approval right-of-way grants.

All rights-of-way granted under the regulations in this part shall be in the nature of easements or permits for the periods stated therein. They are terminable upon abandonment or discontinuance of the use for which granted. Rights-of-way for railroads, telephone lines, telegraph lines, public highways, and water control projects including but not limited to dams, reservoirs, flowage easements, ditches and canals shall be without limitation as to term of years. *Rights-of-way for all other purposes shall be for a period*

(Continued on following page)

> (a) The Act of March 11, 1904 (33 Stat. 65), as amended by the Act of March 2, 1917 (39 Stat. 973; 25 U.S.C. 321), authorizes right-of-way grants for oil and gas pipelines across tribal, individually owned and Government-owned land. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 161. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) shall also be subject to the provisions of this section.
>
> (b) Rights-of-way, granted under aforesaid Act of March 11, 1904, as amended, for oil and gas pipelines, pumping stations or tank sites shall not extend beyond a term of 20 years and may be extended for another period of not to exceed 20 years following the procedures set out in 161.19 of this part.

The current regulations are identical. *See* 25 C.F.R. 169.25(a) and (b).[8]

(Continued from previous page)

of not to exceed 50 years, as fixed by the Secretary and stated in the grant, and shall be subject to renewal for a like term upon compliance with the applicable regulations. [Emphasis added.]

[8] In 1968, the regulations underwent a major revision. As originally proposed in 1967, the term for oil and gas pipeline rights-of-way was a maximum 50 years and all references to terms and conditions under the 1904 Act were eliminated. *See* 32 Fed. Reg. 5512 (1967). As finalized, however, the twenty-year maximum term and references to the 1904 Act were included. *See* 33 Fed. Reg. 19803-09 (1968). The notes to the 1968 regulations explained that the majority of the comments objected to the regulations in their entirety. 33 Fed. Reg. 19803. As to rights-of-way governed by specific acts, the comments stated:

(Continued on following page)

In this litigation, however, the Secretary has taken the position that pipeline rights-of-way can be granted on any terms and conditions he may prescribe, unconstrained by the 1904 Act. At this point, the position of the Department of the Interior and the lower court's decision has caused confusion and conflict in what has otherwise been a straightforward matter. Unless the issue is settled, there will be no certainty and no continuity in the granting of pipeline rights-of-way. The decision of the court of appeals brings back the original confusion which the 1948 Act was intended to clarify, and brings into sharp focus the issue of the proper relationship between the specific right-of-way statutes and the 1948 Act. This situation points up the need for this Court to

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The sections dealing with specific right-of-way, 161.23 *Railroads*, 161.24 *Railroads in Oklahoma*, 161.25 *Oil or gas pipelines*, 161.26 *Telephone and telegraph lines; radio, television and other communications facilities*, and 161.27 *Power projects*, have all been revised in similar ways. The acts under which these rights-of-way may be granted are cited. Provisions required by those acts are included. When a right-of-way is granted for one of these purposes under the 1948 right-of-way act, the provisions of these sections will govern unless a decision is made to except some of the specific requirements. *Id.*

The Bureau of Indian Affairs has twice proposed to rescind the provisions relating to the terms and conditions required by the specific acts governing rights-of-way. *See* 46 Fed. Reg. 22205 (1981) and 51 Fed. Reg. 1391 (1986). Neither of these proposals has been adopted as final. In particular, the 1981 proposal was criticized by commenters because "the revisions removing the specific restriction on right-of-way would result in rights-of-way being granted for extended terms to the detriment of tribes." 51 Fed. Reg. 1391 (1986).

clarify that relationship particularly as it relates to the terms for pipeline rights-of-way.[9]

II. The Court of Appeals' Decision is Premised on a Fact Not Supported by the Record

Central to the court of appeals' holding in this case is its determination that the Tribe consented to fifty-year terms for the rights-of-way at issue. The determination is not supported by the record in this case.

The court of appeals held that the term of years for pipeline rights-of-way could be 20 years under the 1904 Act or 50 years under the 1948 Act. The court also held that under either statute, the Tribe's consent would be necessary, and because the Tribe consented to a fifty-year term that term was valid. Thus, as a central part of its holding, the court relied on a matter not supported by the record, and the court's decision therefore should be reviewed by this Court.

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[9] Resolution of this issue would also provide guidance to the general relationship between other specific right-of-way statutes and the 1948 Act. In addition to the 1904 Act, there are four other statutes which govern specific rights-of-way. They are: Act of Mar. 3, 1901, 31 Stat. 1084, 25 U.S.C. 311 (Opening of highways); Act of Mar. 2, 1899, 30 Stat. 990, 25 U.S.C. 312-318 (Rights-of-way for railway, telegraph & telephone lines); Act of Mar. 3, 1901, 31 Stat. 1083, 25 U.S.C. 319 (Rights-of-way for telephone & telegraph lines [Oklahoma]); Act of Mar. 3, 1909, 35 Stat. 781, 25 U.S.C. 320 (Rights-of-way for reservoirs or materials). All of these statutes were preserved by section 4 of the 1948 Act.

The Tribe consented to the rights-of-way at issue, but no term was specified before or at the time the consent was given. In fact, no term of years is specified or indicated in any right-of-way documents in the record until the rights-of-way were approved as indicated by the notation of approval on the right-of-way maps. Secretarial approval is the last step in the right-of-way grant process, *see* 25 C.F.R. 169.15 (1987), and is given after all statutory and regulatory requirements are met. The approvals by the Secretary for the various pipelines in this case were given anywhere from two months to three years after the Tribe's consent. In addition, except for the application for the 1961 pipeline which recites that it was made pursuant to the 1948 Act, there is nothing in the record indicating whether the rights-of-way were applied for under the 1948 Act or the 1904 Act.[10]

As recognized by the court of appeals, under the terms of the 1948 Act the authority of the Secretary to grant rights-of-way over and across tribal lands is dependent on the Tribe first having consented to the requested right-of-way. This requirement conforms with provisions of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. 476, that tribal consent is required for any alienation of interests in tribal lands. *See Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983).

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[10] Even if it was clear that the rights-of-way were being applied for under the 1948 Act, the term is not automatically 50 years. The Secretary's regulations provided for a term "not to exceed 50 years." 25 C.F.R. 161.19 (1960). Thus, the term under the 1948 Act could have been for any period of time up to 50 years.

Here, although the Tribe consented to the right-of-way, there is no informed consent as contemplated by the 1948 Act and the 1934 Indian Reorganization Act on the term of the right-of-way.[11]

Because the tribal consents do not indicate any term of years, much less the Act under which the right-of-way was applied for (with the exception of the 1961 application which recites the 1948 Act), there is no basis for the Court's conclusion that the Tribe consented to 50-year terms, and no basis for the Court's holding that the Secretary validly granted the rights-of-way for fifty-year terms.[12] Even if fifty-year terms are valid, the Secretary clearly exceeded his authority in granting a right-of-way for a term to which the Tribe did not specifically consent,

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[11] In addition, both the 1934 Act and the 1948 Act require that just compensation be paid for the use of tribal lands. *See F. Cohen, supra* at 544. The absence of compensation for three of the pipelines, and the questionable adequacy of compensation for the 1961 pipeline raise an additional ground for invalidating Montana Power Company's right-of-way grants.

[12] There is no indication in the record that the Tribe specifically chose to consent to a right-of-way under the 1948 Act rather than the 1904 Act. The Tribe was not offered a choice by either Montana Power or the Bureau of Indian Affairs, and it is extremely unlikely that it knew that such a choice existed. As a practical matter, all such matters were and still are handled by the Bureau of Indian Affairs. And as a practical matter, once the 1948 Act became law, that Act rather than the 1904 Act, has been used exclusively by the BIA to grant pipeline rights-of-way on the Blackfeet Reservation and probably other reservations as well.

and where no compensation was provided or it was inadequate.[13]

If there is any doubt at all as to the term of years consented to by the Tribe, the court should remand the case for a factual determination on this issue. Similarly, if there is any doubt as to whether the Tribe made a considered choice to grant the pipeline under the 1948 Act rather that the 1904 Act, or whether the Tribe was compensated, then those issues should also be remanded for a factual determination.

III. The Decision Below Conflicts With a Decision of the United States Court for the Tenth Circuit

As noted above, the court of appeals held that an oil and gas pipeline right-of-way could be granted under the 1904 Act for twenty years *or* under the 1948 Act for fifty years. Its decision directly conflicts with the decision in *Plains Electric Gen. and Tr. Co-op. v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976). The court there held:

> As we view the statutes governing acquisition of rights of way over Indian lands contained in 25 U.S.C. 311-328, they constitute a comprehensive scheme which completely covers the subject of rights-of-way. Sections 311-322 permit grants of rights-of-way for specific purposes; sections 323-328

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[13] The term of the right-of-way has a bearing on whether the compensation for the 1961 grant was adequate. The longer the term, the greater the compensation. No compensation was received for the other three rights-of-way at issue.

> permit grants of rights-of-way for all purposes while preserving the sections applicable to specific purposes.

Under the Tenth Circuit's interpretation, the 1904 Act and the 1948 Act are one right-of-way scheme; the 1904 Act providing the specific terms and the 1948 Act providing the general terms. *See Southern Pacific Transp. Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983) (discussing the relationship between the specific railroad right-of-way statute, 25 U.S.C. 312-318, and the 1948 Act). The court of appeals interpretation below conflicts with the Tenth Circuit's decision in *Plains Electric*.

CONCLUSION

The decision below has a significant impact on the large numbers of existing and future oil and gas pipeline rights-of-way on Indian lands. The relationship between the specific 1904 right-of-way statute and the general 1948 Act presents an important and significant issue which should be clarified by this Court. The petition for certiorari should be granted.

Respectfully submitted,

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June, 1988

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE,
Plaintiff-Appellant,

v.

THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior,
Defendants-Appellees.

No. 87-3697

D.C. No.
CV-83-219-GF

OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
December 11, 1987--Seattle, Washington

Filed January 28, 1988

Before: Eugene A. Wright, J. Blaine Anderson and Mary M. Schroeder, Circuit Judges.

Opinion by Judge Anderson

COUNSEL

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OPINION

ANDERSON, Circuit Judge:

The Blackfeet Indian Tribe seeks to have rights-of-way granted over tribal lands invalidated. The appeal presents the question of whether the Secretary of the Interior exceeded his authority by allowing a fifty-year term for natural gas pipeline rights-of-way across Blackfeet tribal lands. We hold he did not.

I.

Between 1961 and 1969, the Secretary of the Interior ("Secretary") granted The Montana Power Company ("MPC") five rights-of-way for natural gas transmission pipelines across Blackfeet Indian Tribe ("Tribe") lands on the Blackfeet Indian Reservation in Montana. Each right-of-way was granted by the Secretary pursuant to his approval power, and each was for a fifty-year term. At the time of approval, the Tribe also consented to each right-of-way.

In 1981, the Tribe objected to the fifty-year term and notified MPC of its objection. The Tribe contended the terms were limited to twenty rather than fifty years. MPC responded by stating that it was entitled to the fifty-year terms approved by the Secretary.

In 1983, the Tribe filed the present suit, alleging the pipeline rights-of-way granted MPC were limited to twenty years and the Secretary exceeded his authority in approving longer terms. Under the twenty-year period,

the Tribe alleged the right-of-way had expired and MPC was therefore occupying the land as a trespasser.[1]

The district court granted MPC, the United States, and the Secretary partial summary judgment, declaring that the rights-of-way were for fifty years and therefore had not expired. The court held the Secretary did not exceed his authority in approving the rights-of-way for fifty years and that the Tribe had consented to these terms. The district court later issued a Fed. R. Civ. P. 54(b) order of finality on the grant of partial summary judgment. The Tribe immediately appealed.

II.

In 1904, Congress enacted a statute authorizing the Secretary to grant rights-of-way as easements for oil and gas pipelines through any Indian reservation for a period no longer than twenty years. The statute reads as follows:

> "The Secretary of the Interior is authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation . . . *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this section for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. The right to alter, amend, or repeal this section is expressly reserved."

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[1] At the time this case was submitted on appeal, the twenty-year period had expired on four of the rights-of-way. The fifth will expire in 1989.

25 U.S.C. § 321, 33 Stat. 65, Act of March 11, 1904.

With the 1904 Act still in effect, in 1948 Congress passed the Indian Right-of-Way Act. The 1948 Act empowered the Secretary to grant rights-of-way across Indian lands for all purposes. The statute provides:

> "The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians."

25 U.S.C. § 323, 62 Stat. 17, Act of February 5, 1948. The 1948 Act included a second statute which required tribal consent for rights-of-way, stating, in relevant part: "No grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324, 62 Stat. 18. Additionally, the 1948 Act provided that:

> "Sections 323 and 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act, . . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed."

25 U.S.C. § 326, 62 Stat. 18.

Pursuant to the authority granted by the 1948 Act, 25 U.S.C. § 323, empowering the Secretary to grant rights-of-

way "subject to such conditions as he may prescribe," the Secretary promulgated a regulation in 1960 which allowed rights-of-way for oil and gas pipelines for a period not to exceed fifty years:

> "All rights-of-way granted under the regulations in this part shall be in the nature of easements or permits for the period state therein. They are terminable upon abandonment or discontinuance of the use for which granted. Rights-of-way for railroads, telephone lines, telegraph lines, public highways, and water control projects including but not limited to dams, reservoirs, flowage easements, ditches and canals shall be without limitation as to term of years. Rights-of-way for all other purposes shall be for a period of not to exceed 50 years, as fixed by the Secretary and stated in the grant, and shall be subject to renewal for a like term upon compliance with the applicable regulations."

25 C.F.R. § 161.19 (1960). In 1968, the regulation was amended to allow the Secretary to grant rights-of-way for *all* easements, *including* oil and gas pipelines, for an unlimited term of years. 25 C.F.R. § 161.18 (1968). *See also United States v. Mitchell*, 463 U.S. 206, 223 (1983).

However, the regulation promulgated pursuant to the 1904 Act limited oil and gas pipeline rights-of-way to not more than 20 years: "Rights of way, granted under [25 U.S.C. § 321], for oil and gas pipelines, . . . shall not extend beyond a term of 20 years. . . ." 25 C.F.R. § 161.25(b)(1968). Thus the rights-of-way acquired by MPC could be subject to section 161.18 covering all rights-of-way and allowing unlimited terms; or subject to section 161.25(b) covering only oil and gas pipeline rights-of-way and limiting the term of years to not more than twenty; or subject to the original regulation, 25

C.F.R. § 161.19 (1960), providing for not more than a fifty-year term for all rights-of-way.

Because the rights-of-way at issue here were limited to fifty years, we need not consider the validity of the 1968 amendment insofar as it allowed terms in excess of fifty years. Also, we note that each regulation was promulgated pursuant to the authority of the Acts of 1904 and 1948. As a result, the essential question is whether the 1904 Act, 1948 Act, or both, control the five rights-of-way the Secretary granted MPC.[2]

III.

Since we are reviewing an issue involving statutory construction and a grant of summary judgment, the standard of review is *de novo*. *Native Village of Stevens v. Smith*, 770 F.2d 1486, 1487 (9th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986). However, when faced with an issue of statutory construction, we give deference to the agency charged with administering that statute. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616, *reh. den.*, 380 U.S. 989 (1965); *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 552 (9th Cir.), *cert. denied*, 464 U.S. 960 (1983). Consequently, we will sustain the Secretary's construction of the statues if it is reasonable, even though another construction appears equally plausible. *Southern Pacific*, 700 F.2d at 552; *Lanning v. Marshall*, 650 F.2d 1055, 1057 n.4 (9th Cir. 1981).

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[2] In answering this question as we do, we find it unnecessary to determine which of each of the five rights-of-way was granted pursuant to the authority of which Act.

IV.

The starting point for an issue involving statutory construction is the language in the statue itself. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Where two statutes are involved, legislative intent to repeal an earlier statute must be clear and manifest. In the absence of such intent, apparently conflicting statues must be read to give effect to each if such can be done by preserving their sense and purpose. *Id.* at 267; 1A *Sutherland Stat. Const.* § 23.09 (4th Ed. 1985)(if the inconsistency between a later act and an earlier one is not fatal to the operation of either, the two may stand together and no repeal will be effected). This is because statutory repeals by implication from a later enacted statute are disfavored. *SDC Development Corp. v. Mathews*, 542 F.2d 1116, 1118 n.5 (9th Cir. 1976). Also, where possible, we resolve legal ambiguities in favor of Indians, but we cannot ignore the plain intent of Congress. *See South Carolina v. Catawaba Indian Tribe*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986).

Here, the language in neither Act speaks to the relationship of the Acts *inter se*. We therefore look to congressional intent with an eye toward upholding both statutes. *Id.* The 1904 Act is specific. It authorizes the Secretary to grant rights-of-way for oil and gas pipelines for up to a twenty-year period. 25 U.S.C. § 321. The later enacted Act of 1948 is more general; it grants the Secretary the power to grant "rights-of-way for *all* purposes" subject to the conditions he prescribed. 25 U.S.C. § 323. Additionally, the 1948 Act stated that it was not to "in any manner amend or repeal . . . any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands. . . ." 25 U.S.C. § 326.

There is no express congressional intent to repeal § 321, even with the law's unaffected language contained in § 326. In 1904, the Secretary was given the authority to grant easements for oil and gas pipelines. Later, in an attempt to broaden the Secretary's powers in granting rights-of-way for access to Indian lands for other purposes, the 1948 Act was passed. It was meant to "satisfy the need for simplification and uniformity in the administration of Indian law." H.R. Rep. No. 739, 80th Cong. 1st Sess., *reprinted* in 1948 U.S. Code Cong. & Admin.News 1033, 1035. To avoid confusion, the existing special purpose statutes (such as section 321) were preserved in anticipation of implementation of the general purpose statute of § 323. *See Id.* at 1036; 25 U.S.C. § 326.

The Act of 1904 and the Act of 1948 can be read as coexisting. The former allows a term of 20 years, the later a term of 50 years. No matter which term the Secretary permits, the consent of the Tribe is still required. 28 U.S.C. § 324. Presumably, if the Tribe did not approve a 50-year term, approval of a 20-year term would be much more likely. In either case, the Tribe has preserved its election and its ability to protect Tribal interests. Thus the two Acts are not in direct conflict, and effect can be given to each while still preserving their sense and purpose. *See Watt v. Alaska*, 451 U.S. at 267.

Analogous cases support this view. In *Nebraska Public Power District v. 100.95 Acres of Land*, 719 F.2d 956, 961 (8th Cir. 1983), the court held that the 1948 Act did not impliedly repeal the Indian General Allotment Act of 1901, 25 U.S.C. § 357, and its condemnation statute. In this, the court found the 1901 Act and the 1948 Act were not in irreconcilable conflict and effect could be given to

each. *Id.* Moreover, in so holding, the court relied on the Ninth Circuit decision of *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959), where we held that the 1948 Act and § 357 provided two means of easement across Indian land for electric transmission lines. *Id.* at 960. We reaffirmed this analysis in *Southern California Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

On this basis, we shall follow the Eighth Circuit's analysis in *Nebraska Public Power* with respect to reconciling § 321 with the 1948 Act. The oil and gas pipeline statute, 25 U.S.C. § 321, is not distinguishable in any significant degree as far as the congressional intent is concerned from the allotment statute, 25 U.S.C. § 357, at issue in *Nebraska Public Power.*

The Tribe argues *Nebraska Public Power* is distinguishable because the 1901 Act did not require tribal consent. Also, the Tribe argues that the 1904 and 1948 Acts are not separate and distinct because they both provide the same method of acquiring rights-of-way.

We find the Tribe's arguments unpersuasive. The fact that the 1901 Act did not require consent does not distinguish the *Nebraska Public Power* analysis as far as the congressional purpose of the 1948 Act with respect to earlier specific statutes is concerned. Moreover, while the 1901 and 1948 Acts provide the same method of acquiring a right-of-way, this does not mean applying the former negates application of the latter.

Since effect can be given to both the 1904 and the 1948 Acts, both should be applied. This gave the Tribe a choice between either the 20-year term under the earlier

statute or up to a 50-year term under the latter statute. The Tribe consented to a 50-year term. The term of years was controlled by both Acts and the Secretary did not exceed his authority in providing regulations allowing 50-year terms.

V.

We hold the term of years for the rights-of-way can be either 20 or 50 years. Since the Tribe consented to the 50-year term, the Secretary's regulations with respect to term of years are valid. The district court properly entered judgment for MPC and the Secretary. Consistent with our holding, we find the Tribe is not entitled to attorney's fees.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

The Blackfeet Indian Tribe,
Plaintiff,

v.

Montana Power Company, a Montana corporation; The United States of America; and Donald Paul Hodel, Secretary of Interior,
Defendants.

JUDGMENT IN A CIVIL CASE

Filed November 24, 1986

CASE NUMBER: CV-83-219-GF

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Montana Power Company's motion for partial summary judgment be, and the same hereby is, GRANTED.

November 24, 1986
Date

LOU ALEKSICH, JR.
Clerk

Carol A. Henderson
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE BLACKFEET INDIAN TRIBE, *Plaintiff,*	
vs.	NO. CV-83-219-GF
MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD PAUL HODEL, SECRETARY OF INTERIOR, *Defendants.*	MEMORANDUM AND ORDER (Filed Nov. 24, 1986)

The above-entitled action is presently before the court on cross-motions for partial summary judgment. The Blackfeet Indian Tribe ("the Tribe") originally filed suit against the Montana Power Company ("MPC"), the United States, and the Secretary of the Interior ("the Secretary"), alleging various violations of oil and gas leases between the Tribe, as lessor, and MPC. The Tribe further alleges certain pipeline rights-of-way granted to MPC have expired and, therefore, MPC's continued use of the rights-of-way constitutes a trespass. The cross-motions for summary judgment address the sole issue of whether the rights-of-way have expired. Jurisdiction vests with this court pursuant to 28 U.S.C. §1362.

FACTS

The Secretary granted MPC five pipeline rights-of-way across the Tribe's land between the years 1961 and

1969. The Tribe consented to each right-of-way as evidenced by various tribal resolutions. Furthermore, each right-of-way was approved by the Secretary pursuant to the Act of February 5, 1948, 25 U.S.C. §§323-328, for a term of 50 years.

The Tribe first objected to these rights-of-way on April 28, 1981, when it passed a resolution asserting the rights-of-way granted MPC were only for a term of 20 years. The Tribe claims the Act of March 11, 1904, 25 U.S.C. §321 ("1904 Act"), established 20 year terms for pipeline rights-of-way and, therefore, the Secretary exceeded his authority in granting 50 year rights-of-way to MPC. Furthermore, the Tribe believes, based on its interpretation of the applicable statutes, that the various rights-of-way granted MPC have expired and MPC's continued use of them constitutes a trespass.

On the other hand, MPC submits it expressly applied for and was granted 50 year rights-of-way by the Tribe's Superintendent. MPC relies on the Act of February 5, 1948, 25 U.S.C. §§323-328 ("1948 Act"), which does not set any specific term of years for rights-of-way.

DISCUSSION

The primary issue before the court is whether the Secretary, or his delegate, had the authority to grant a 50-year pipeline right-of-way. In resolving this issue, the court must decide whether the 1904 Act or the 1948 Act governs rights-of-way across Indian lands.

The Secretary, prior to 1948, possessed authority under various special purpose access statutes to grant

different types of easements across Indian lands. *Nebraska Public Power District v. 100.95 Acres of Land*, 540 F.Supp. 592, 597-598 (Neb. 1982). One such statute was the 1904 Act, which authorized the Secretary to grant rights-of-way for oil and gas pipelines across Indian lands. The 1904 Act specifically limits such rights-of-way to 20 year terms. 25 U.S.C. §321.

In 1948, Congress enacted a comprehensive, general purpose right-of-way statute entitled "The Indian Right-Of-Way Act of 1948" ("1948 Act"). The 1948 Act empowered the Secretary to grant rights-of-way for all purposes over and across Indian lands. 25 U.S.C. §323. Furthermore, it set no limits on the term of any rights-of-way.

The 1948 Act was originally meant to simplify the granting of rights-of-way across certain Osage Indian lands in Oklahoma. S.Rep. No. 823, 80th Cong., 2nd Sess. 2 (1948). However, that Act was later amended to encompass rights-of-way across all Indian lands.

In expressing his support for the amended bill, Under Secretary of the Interior Oscar L. Chapman commented:

> It will go a long way to satisfy the need for simplification and uniformity in the administration of Indian law. At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that the right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way

> that may be granted, or the character of the land across which it may be granted.
>
> * * *
>
> When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior. Very often as many as 15 to 20 individual Indians own undivided interests in 1 parcel of land and the signatures of all owners must be obtained. As a general rule these owners are widely scattered and frequently one or more of them are deceased and their heirs have not been determined. Thus, years may elapse before all of the owners' signatures can be obtained. As a practical matter, the burden of obtaining signatures to easement deeds falls on this Department and becomes a time and money consuming operation. In a great many cases the value and amount of land required for a right-of-way is very little and the cost to the United States in time and money is very high.

S.Rep. No. 823, 80th Cong., 2nd Sess. 3-4 (1948).

As discussed above, the 1948 Act was intended to simplify the means of acquiring rights-of-way over Indian lands. *Nebraska Public Power District v. 100.95 Acres of Land, supra,* 540 F.Supp. at 598; S.Rep. No. 823, 80th Cong., 2nd Sess. 3 (1948). However, the 1948 Act specifically refused to repeal any existing statutes empowering the Secretary to grant rights-of-way over Indian land. *See,* 25 U.S.C. §326. In commenting on the proposed 1948 Act, Under Secretary of the Interior Chapman stated:

> In order to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new, provision has also been made

> in section 4 of the bill to preserve the existing statutory authority relating to rights-of-way over Indian lands. . . .

S.Rep. No. 823, 80th Cong., 2nd Sess. 4 (1948).

MPC cites Under Secretary Chapman's comments in support of its position that the 1948 Act created an independent statutory scheme for acquiring rights-of-way and not a scheme dependent upon other statutory authority, specifically the 1904 Act. MPC contends the 1948 Act addresses rights-of-way for all purposes and provides the Secretary broad authority to issue regulations implementing the Act, including the authority to regulate the term of rights-of-way. Because Congress did not repeal the 1904 Act, MPC submits that parties negotiating a right-of-way agreement can choose to be governed by the 1904 Act or the 1948 Act, depending on which Act they cite in the application. In the instant case, MPC applied for a 50-year right-of-way and received the same from the Secretary under the 1948 Act. Therefore, MPC asserts the Secretary did not exceed his authority and the 50-year right-of-way should be upheld.

On the other hand, the Tribe maintains the two Acts combine to create one scheme governing pipeline rights-of-way, with the 1904 Act establishing the term of years. According to the Tribe, the 1904 Act provides the specific terms of the right-of-way and the 1948 Act provides the more general terms in addition to filling the gaps where existing right-of-way legislation was inadequate. Therefore, the Tribe asserts that the 1904 Act, being specifically preserved by the 1948 Act, establishes a 20-year term for MPC's pipeline rights-of-way.

A careful reading of the 1904 and 1948 Acts, together with their legislative histories, leads this court to conclude the two Acts create separate and independent means of acquiring rights-of-way across Indian lands. In enacting the 1948 Act, Congress did not specifically require the 1904 and 1948 Acts be jointly construed to establish the terms and conditions for oil and gas pipeline rights-of-way. Furthermore, Congress did not specifically exclude oil and gas pipeline rights-of-way from the 1948 Act.

The plain language of the 1948 Act gives the Secretary authority "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe. . . ." 25 U.S.C. § 323. One condition the Secretary could reasonably prescribe in granting rights-of-way under 25 U.S.C. §323 is the term of such rights-of-way. Furthermore, when the rights-of-way at issue were granted, the Department of the Interior's administrative regulations permitted 50-year terms for oil and gas pipeline rights-of-way. 25 C.F.R. §161.19 (1960). Therefore, in granting MPC 50-year rights-of-way, the Secretary was merely exercising the power Congress had bestowed upon him.

Finally, Under Secretary Chapman's comment that the earlier right-of-way statutes were being preserved "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new,"[1] is indicative of Congress' intent in enacting the 1948 Act. The court concludes Congress intended to

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[1] S.Rep. No. 823, 80th Cong., 2nd Sess. 4 (1948).

create a separate and independent means of acquiring rights-of-way, and not a means dependent on the earlier 1904 Act.

The Tribe further alleges that the more specific 1904 Act should govern the more general 1948 Act. In evaluating a statute, the test is the manifested intention of Congress, and not whether the statute is general or specific. *Nicodemus v. Washington Water Power Company*, 264 F.2d 614, 617 (9th Cir. 1959). In the instant case, the Tribe's argument fails because Congress clearly manifested its intent that the 1948 Act empowers the Secretary to grant rights-of-way for all purposes.

The 1904 and 1948 Acts represent separate and independent means of acquiring rights-of-way. In the instant case, the parties expressly agreed to 50-year rights-of-way under the 1948 Act. In approving those rights-of-way, the Secretary did not exceed his authority under the 1948 Act.

For the reasons cited herein,

The court concludes the rights-of-way granted MPC by the Tribe were for a (sic) terms of 50 years. Therefore,

IT IS HEREBY ORDERED that MPC's motion for partial summary judgment be, and the same hereby is, GRANTED, and the Tribe's motion for partial summary judgment is DENIED.

DATED this 24 day of November, 1986.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE, *Plaintiff-Appellant,*	
vs.	NO. 87-3697
THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior, *Defendants-Appellees.*	CV-83-219-GF (Filed March 31, 1988)

APPEAL from the United States District Court for the GREAT FALLS District of MONTANA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the GREAT FALLS District of MONTANA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered FEB 24, 1988.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE, *Plaintiff-Appellant,* v. THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior, *Defendants-Appellees.*	NO. 87-3697 D.C. No. 83-219-GF ORDER (Filed March 21, 1988)

Before: WRIGHT, ANDERSON, and SCHROEDER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is DENIED.

The Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. §321 provides:

> CHAP. 505.–An Act Authorizing the Secretary of the Interior to grant right of way for pipe lines through Indian lands.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further*, That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements can not be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who

shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and case: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this Act is expressly reserved.

The Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§323-328 provides:

AN ACT

To empower the Secretary of the Interior to grant rights-of-way for various purposes across lands of individual Indians or Indian tribes, communities, bands or nations.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That the Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

SEC. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or

devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

SEC. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

SEC. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed hereby.

SEC. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

SEC. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

SEC. 7. This Act shall not become operative until thirty days after its approval.

No. 87-2108

In The

Supreme Court of the United States

October Term, 1988

The Blackfeet Indian Tribe,

Petitioner,

vs.

The Montana Power Company, a Montana Corporation; the United States of America; and Donald P. Hodel, Secretary of the Interior,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Secretary of the Interior exceeded his authority by allowing fifty-year terms for natural gas pipeline rights-of-way crossing the Blackfeet Reservation.

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TABLE OF AUTHORITIES

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, The Montana Power Company, respectfully urges that the Blackfeet Tribe's (Tribe) Petition for Writ of Certiorari (Petition) to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 24, 1988, and its Opinion entered on January 28, 1988, be denied for the reasons stated herein.

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OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit is reported at 838 F.2d 1055 (9th Cir. 1988), *reh'g denied*, — F.2d — (March 21, 1988), and is reprinted in the Appendix at 1-10. The opinion of the United States District Court for the District of Montana is unpublished and is reprinted in the Appendix at 11-18.

Other jurisdiction and statutory provisions have been supplied to the Court by the Tribe in its Petition at 1-2.

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STATEMENT OF THE CASE

Between the years 1961 and 1969, the Secretary of the Interior (Secretary) granted The Montana Power Company (MPC)[1] rights-of-way for natural gas pipelines

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1 MPC is a corporation incorporated in the State of Montana. Its subsidiaries that are not wholly owned are as follows: Intermountain Digital Network, Inc., a Montana corporation.

crossing the Blackfeet Indian Reservation. Pursuant to the Act of February 5, 1948, (hereinafter 1948 Act), 62 Stat. 17 (codified at 25 U.S.C. §§ 323-328 (1982)), App. at 23, 24, the Secretary approved these rights-of-way for fifty year terms. Significantly, the Tribe consented to each right-of-way as reflected in various Tribal resolutions.

MPC did not gratuitously receive these rights-of-way. For example, in consideration for the rights-of-way to which the Tribe consented on May 26, 1961, MPC agreed to extend gas service to Browning and East Glacier, Montana, and to purchase gas discovered on the reservation that could be economically taken and marketed.[2] In consideration for the right-of-way granted September 27, 1962 and for the right to drill oil and gas in portions of Sections 6 and 8, Township 37 North, Range 7 West, MPC paid the Tribe bonuses of $1,627.60 and $1,638.40, respectively, and has paid the Tribe royalty for extracted oil and gas.[3]

The Tribe did not object to any of the rights-of-way it had granted until April 28, 1981. On this date, the Tribe passed a resolution asserting that in 1961 the Tribe had granted MPC rights-of-way for only twenty year terms pursuant to the Act of March 11, 1904 (hereinafter 1904 Act), 33 Stat. 65 (codified as amended at 25 U.S.C. § 321 (1982)), App. at 21, 22, 23, rather than fifty year terms, and demanded that MPC renew its right-of-way authorization prior to May 31, 1981. MCP balked at this demand because the Tribe had agreed to fifty year terms for all rights-of-way granted.

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2 Excerpt of Record at 72, 75, 119 and 120.

3 Excerpt of Record at 81 and 82.

From 1981 to 1983, MPC and the Tribe attempted unsuccessfully to resolve the right-of-way issue, among other issues. On December 16, 1983, the Tribe filed suit against MPC, the United States and the Secretary. The parties filed cross motions for partial summary judgment on the right-of-way issue, thereby indicating that no genuine issues of material fact existed. The district court granted MPC, the United States and the Secretary partial summary judgment, holding that the Secretary had the authority to grant rights-of-way for fifty years and that the Tribe consented to the rights-of-way granted, including the terms for the rights-of-way. On appeal, the Ninth Circuit affirmed the district court's decision.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals fairly and accurately determined that in granting rights-of-way for natural gas pipelines across Indian lands, an Indian tribe can choose to be bound by either the 1948 Act or the 1904 Act. In this case, the Blackfeet Tribe attempts to persuade this Court that the court of appeals' decision is flawed. The Tribe's arguments are not cogent.

Attempting to paint a different face on an argument that two lower courts have rejected, the Tribe interjects questions of fact not raised before the courts below. For example, the Tribe asks this Court to review the adequacy of payment for the rights-of-way the Tribe granted to MPC and whether the Tribe consented to fifty year terms for the rights-of-way at issue. The Tribe offers no com-

pelling reasons why this Court should accept an invitation to participate in such an extensive fact finding mission.

Though the Tribe attempts to argue otherwise, this case does not present issues that are special or extraordinary. The Ninth Circuit Court of Appeals' decision does not stand at odds with any other reported cases; further, as the Tribe's Petition, perhaps unwittingly, reveals, this case turns more on its own unique facts and, therefore, its resolution is of primary importance to the parties and not the public.

———o———

REASONS FOR DENYING THE PETITION

I. The Tribe Is Asking This Court To Examine Issues of Fact Not Raised Before the Lower Courts

The Tribe strenuously argues that, contrary to the findings of the district court and the court of appeals that the Tribe consented to the fifty year terms for the rights-of-way at issue, the record does not support these findings, and that this Court should remand the case for a factual determination of this issue. Petition at 10, 13. This argument is not persuasive for two reasons.

First, the Tribe did not raise this specific consent issue before the district court or the court of appeals. The consent issue is noticeably absent from the issues the Tribe framed for Ninth Circuit consideration. App. at 25. Though the Tribe did touch on this consent issue in a footnote contained in its Ninth Circuit reply brief, this cursory discussion reveals that the Tribe did not intend to present the issue on appeal for resolution.[4] Further, at the district

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4 Tribe's Reply Brief, n. 3.

court the Tribe filed a cross motion for summary judgment on the right-of-way issue. If the Tribe believed that a genuine issue of material fact existed concerning the terms consented to by the Tribe, it should not have filed that motion or it should have requested a factual determination on the consent question. By filing the motion for summary judgment, the Tribe explicitly recognized that no genuine issues of material fact existed, including that no genuine issue existed concerning consent for the terms of the rights-of-way granted.

Second, because the parties presented no factual disputes, the courts below had little trouble agreeing upon the relevant facts. In its opinion, the district court found that the Tribe had expressly agreed to fifty year term rights-of-way, and the court of appeals similarly concluded that the Tribe had consented to fifty year terms. App. at 10, 18. This Court has consistently decided that it cannot review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Goodman v. Lukens Steel Co.*, — U.S. —, 107 S.Ct. 2617, 2623, 96 L.Ed.2d 572 (1987). Here, no such showing can be made because the record and the summary judgment motion reasonably demonstrate that the Tribe consented to the rights-of-way and their terms.

The Tribe further complicates this case and its Petition by requesting the Court to dissect additional matters of fact not raised before the courts below. In its Petition, the Tribe asks this Court to carefully ponder whether the Tribe made a considered choice to grant the pipeline rights-of-way under the 1948 Act rather than the 1904 Act, or whether the Tribe was properly compensated for the rights-of-way. Petition at 13. In making these requests,

the Tribe not only asks this Court to review evidence and discuss specific facts, a task normally beyond certiorari review, *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed. 925 (1925), but also asks it to review facts not raised below. Certiorari is not meant to resolve such factual tangles; therefore, the Tribe's requests are inappropriate.

II. The Court of Appeals' Decision Does Not Conflict With A Decision Of Any Other Court

The Tribe cites *Plains Elec. Generation & Transmission Coop. v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976), as a case that directly conflicts with the lower courts' opinions. For the following reasons, *Plains Electric* has no bearing on the case before this Court.

Plains Electric concerned a condemnation action by Plains Electric Generation & Transmission Coop. under the State of New Mexico's power of eminent domain. Initially, Plains Electric sought to condemn lands of the Pueblo of Laguna Indians under the Act of of May 10, 1926, 44 Stat. 498 (repealed 1976), an Act that allowed for condemnation under the laws of the State of New Mexico without the consent of the Indians or the Secretary. The Tenth Circuit Court ruled that the Act of April 21, 1928, 45 Stat. 422 (codified as amended at 25 U.S.C. § 322 (1982)), and the 1948 Act implicitly repealed the Act of May 10, 1926. In its decision, the court did not critically evaluate the 1904 and 1948 Acts. Also, though the court correctly concluded that the 1904 and 1948 Acts, along with other Acts, constitute a comprehensive scheme that completely covers the subject of rights-of-way, it neither stated nor even remotely implied that the 1904 and 1948

Acts constitute together *one* right-of-way scheme, the 1904 Act supplying the specific terms and the 1948 Act the general terms. In summary, *Plains Electric* did not address the issue outstanding in the present case.

The Tribe further argues that the court of appeals' decision has created confusion and uncertainty. Petition at 6, 9. This argument, however, is not in accord with the court's opinion. In its opinion, the court of appeals held that the Tribe could have consented to rights-of-way governed by the 1904 Act or the 1948 Act. App. at 9, 10. Thus, the decision has created a choice, not confusion, and will promote flexibility in right-of-way negotiations between a tribe, individual landowners and a party seeking a right-of-way. The court's decision has enhanced a tribe's negotiating position, and in doing so has fulfilled the letter and spirit of the 1948 Act and the regulations issued thereunder.

III. This Case Does Not Raise An Issue That Is Of National Significance

In *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923) this Court, in reviewing what it called "an ordinary patent case," 261 U.S. at 388, succinctly enunciated the guiding principle that it will not grant a writ of certiorari "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . ." 261 U.S. at 393.

The Tribe seeks this Court's review of a case involving rights-of-way for gas pipelines across the Blackfeet Reservation. While this case has been proceeding through the judicial system, gas explorers have continued

their pursuit of this elusive fuel; rights-of-way have been granted across Indian lands; for those who have been diligent—and lucky—gas has been tapped and sold; and gas has continued to flow through pipelines crossing the Blackfeet Reservation to its ultimate consumer destination. This case has not affected and will not affect these fundamental activities. To be sure, the parties in this case are vitally interested in the resolution of the issues; however, the public's fundamental interests and rights are not at stake in this case, no matter the outcome.

A sure sign that a resolution of this case is of primary importance to the parties and not the public is that the Tribe, as discussed above, has for the most part presented a case to this Court that revolves around a unique set of facts. These facts are of interest only to the parties and have no significance beyond the limited confines of this case.

CONCLUSION

The decision of the Ninth Circuit was fair and it accurately applied the law and regulations. Certiorari, therefore, should be denied.

Respectfully submitted,

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July, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE,
Plaintiff-Appellant,

v.

THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior,
Defendants-Appellees.

No. 87-3697

D.C. No.
CV-83-219-GF

OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
December 11, 1987—Seattle, Washington

Filed January 28, 1988

Before: Eugene A. Wright, J. Blaine Anderson and Mary M. Schroeder, Circuit Judges.

Opinion by Judge Anderson

COUNSEL

Jeanne S. Whiteing, Boulder, Colorado, for the plaintiff-appellant.

Michael P. Manion, Butte, Montana; Edward J. Shawaker, Land and Natural Resources Division, Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

ANDERSON, Circuit Judge:

The Blackfeet Indian Tribe seeks to have rights-of-way granted over tribal lands invalidated. The appeal presents the question of whether the Secretary of the Interior exceeded his authority by allowing a fifty-year term for natural gas pipeline rights-of-way across Blackfeet tribal lands. We hold he did not.

I.

Between 1961 and 1969, the Secretary of the Interior ("Secretary") granted The Montana Power Company ("MPC") five rights-of-way for natural gas transmission pipelines across Blackfeet Indian Tribe ("Tribe") lands on the Blackfeet Indian Reservation in Montana. Each right-of-way was granted by the Secretary pursuant to his approval power, and each was for a fifty-year term. At the time of approval, the Tribe also consented to each right-of-way.

In 1981, the Tribe objected to the fifty-year term and notified MPC of its objection. The Tribe contended the terms were limited to twenty rather than fifty years. MPC responded by stating that it was entitled to the fifty-year terms approved by the Secretary.

In 1983, the Tribe filed the present suit, alleging the pipeline rights-of-way granted MPC were limited to twenty years and the Secretary exceeded his authority in approving longer terms. Under the twenty-year period,

the Tribe alleged the right-of-way had expired and MPC was therefore occupying the land as a trespasser.[1]

The district court granted MPC, the United States, and the Secretary partial summary judgment, declaring that the rights-of-way were for fifty years and therefore had not expired. The court held the Secretary did not exceed his authority in approving the rights-of-way for fifty years and that the Tribe had consented to these terms. The district court later issued a Fed. R. Civ. P. 54(b) order of finality on the grant of partial summary judgment. The Tribe immediately appealed.

II.

In 1904, Congress enacted a statute authorizing the Secretary to grant rights-of-way as easements for oil and gas pipelines through any Indian reservation for a period no longer than twenty years. The statute reads as follows:

> "The Secretary of the Interior is authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation . . . *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this section for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. The right to alter, amend, or repeal this section is expressly reserved."

25 U.S.C. § 321, 33 Stat. 65, Act of March 11, 1904.

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[1]At the time this case was submitted on appeal, the twenty-year period had expired on four of the rights-of-way. The fifth will expire in 1989.

With the 1904 Act still in effect, in 1948 Congress passed the Indian Right-of-Way Act. The 1948 Act empowered the Secretary to grant rights-of-way across Indian lands for all purposes. The statute provides:

> "The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians."

25 U.S.C. § 323, 62 Stat. 17, Act of February 5, 1948. The 1948 Act included a second statute which required tribal consent for rights-of-way, stating, in relevant part: "No grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324, 62 Stat. 18. Additionally, the 1948 Act provided that:

> "Sections 323 and 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act, . . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed."

25 U.S.C. § 326, 62 Stat. 18.

Pursuant to the authority granted by the 1948 Act, 25 U.S.C. § 323, empowering the Secretary to grant rights-of-

way "subject to such conditions as he may prescribe," the Secretary promulgated a regulation in 1960 which allowed rights-of-way for oil and gas pipelines for a period not to exceed fifty years:

> "All rights-of-way granted under the regulations in this part shall be in the nature of easements or permits for the period stated therein. They are terminable upon abandonment or discontinuance of the use for which granted. Rights-of-way for railroads, telephone lines, telegraph lines, public highways, and water control projects including but not limited to dams, reservoirs, flowage easements, ditches and canals shall be without limitation as to term of years. Rights-of-way for all other purposes shall be for a period of not to exceed 50 years, as fixed by the Secretary and stated in the grant, and shall be subject to renewal for a like term upon compliance with the applicable regulations."

25 C.F.R. § 161.19 (1960). In 1968, the regulation was amended to allow the Secretary to grant rights-of-way for *all* easements, *including* oil and gas pipelines, for an unlimited term of years. 25 C.F.R. § 161.18 (1968). *See also United States v. Mitchell*, 463 U.S. 206, 223 (1983).

However, the regulation promulgated pursuant to the 1904 Act limited oil and gas pipeline rights-of-way to not more than 20 years: "Rights of way, granted under [25 U.S.C. § 321], for oil and gas pipelines, . . . shall not extend beyond a term of 20 years. . . ." 25 C.F.R. § 161.25 (b)(1968). Thus the rights-of-way acquired by MPC could be subject to section 161.18 covering all rights-of-way and allowing unlimited terms; or subject to section 161.25(b) covering only oil and gas pipeline rights-of-way and limiting the term of years to not more than twenty; or subject

to the original regulation, 25 C.F.R. § 161.19 (1960), providing for not more than a fifty-year term for all rights-of-way.

Because the rights-of-way at issue here were limited to fifty years, we need not consider the validity of the 1968 amendment insofar as it allowed terms in excess of fifty years. Also, we note that each regulation was promulgated pursuant to the authority of the Acts of 1904 and 1948. As a result, the essential question is whether the 1904 Act, 1948 Act, or both, control the five rights-of-way the Secretary granted MPC.[2]

III.

Since we are reviewing an issue involving statutory construction and a grant of summary judgment, the standard of review is *de novo*. *Native Village of Stevens v. Smith*, 770 F.2d 1486, 1487 (9th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986). However, when faced with an issue of statutory construction, we give deference to the agency charged with administering that statute. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616, *reh. den.*, 380 U.S. 989 (1965); *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 552 (9th Cir.), *cert. denied*, 464 U.S. 960 (1983). Consequently, we will sustain the Secretary's construction of the statutes if it is reasonable, even though another construction appears equally plausible. *Southern Pacific*, 700 F.2d at 552; *Lanning v. Marshall*, 650 F.2d 1055, 1057 n.4 (9th Cir. 1981).

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[2]In answering this question as we do, we find it unnecessary to determine which of each of the five rights-of-way was granted pursuant to the authority of which Act.

IV.

The starting point for an issue involving statutory construction is the language in the statute itself. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Where two statutes are involved, legislative intent to repeal an earlier statute must be clear and manifest. In the absence of such intent, apparently conflicting statutes must be read to give effect to each if such can be done by preserving their sense and purpose. *Id.* at 267; 1A *Sutherland Stat. Const.* § 23.09 (4th Ed. 1985) (if the inconsistency between a later act and an earlier one is not fatal to the operation of either, the two may stand together and no repeal will be effected). This is because statutory repeals by implication from a later enacted statute are disfavored. *SDC Development Corp. v. Mathews*, 542 F.2d 1116, 1118 n.5 (9th Cir. 1976). Also, where possible, we resolve legal ambiguities in favor of Indians, but we cannot ignore the plain intent of Congress. *See South Carolina v. Catawaba Indian Tribe*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986).

Here the language in neither Act speaks to the relationship of the Acts *inter se*. We therefore look to congressional intent with an eye toward upholding both statutes. *Id.* The 1904 Act is specific. It authorizes the Secretary to grant rights-of-way for oil and gas pipelines for up to a twenty-year period. 25 U.S.C. § 321. The later enacted Act of 1948 is more general; it grants the Secretary the power to grant "rights-of-way for *all* purposes" subject to the conditions he prescribed. 25 U.S.C. § 323. Additionally, the 1948 Act stated that it was not to "in any manner amend or repeal . . . any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands. . . ." 25 U.S.C. § 326.

There is no express congressional intent to repeal § 321, even with the law's unaffected language contained in § 326. In 1904, the Secretary was given the authority to grant easements for oil and gas pipelines. Later, in an attempt to broaden the Secretary's powers in granting rights-of-way for access to Indian lands for other purposes, the 1948 Act was passed. It was meant to "satisfy the need for simplification and uniformity in the administration of Indian law." H.R. Rep. No. 739, 80th Cong. 1st Sess., *reprinted* in 1948 U.S. Code Cong. & Admin. News 1033, 1035. To avoid confusion, the existing special purpose statutes (such as section 321) were preserved in anticipation of implementation of the general purpose statute of § 323. *See Id.* at 1036; 25 U.S.C. § 326.

The Act of 1904 and the Act of 1948 can be read as coexisting. The former allows a term of 20 years, the later a term of 50 years. No matter which term the Secretary permits, the consent of the Tribe is still required. 28 U.S.C. § 324. Presumably, if the Tribe did not approve a 50-year term, approval of a 20-year term would be much more likely. In either case, the Tribe has preserved its election and its ability to protect Tribal interests. Thus the two Acts are not in direct conflict, and effect can be given to each while still preserving their sense and purpose. *See Watt v. Alaska*, 451 U.S. at 267.

Analogous cases support this view. In *Nebraska Public Power District v. 100.95 Acres of Land*, 719 F.2d 956, 961 (8th Cir. 1983), the court held that the 1948 Act did not impliedly repeal the Indian General Allotment Act of 1901, 25 U.S.C. § 357, and its condemnation statute. In this, the court found the 1901 Act and the 1948 Act were

not in irreconcilable conflict and effect could be given to each. *Id.* Moreover, in so holding, the court relied on the Ninth Circuit decision of *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959), where we held that the 1948 Act and § 357 provided two means of easement across Indian land for electric transmission lines. *Id.* at 960. We reaffirmed this analysis in *Southern California Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982), *cert. denied*, 450 U.S. 1051 (1983).

On this basis, we shall follow the Eighth Circuit's analysis in *Nebraska Public Power* with respect to reconciling § 321 with the 1948 Act. The oil and gas pipeline statute, 25 U.S.C. § 321, is not distinguishable in any significant degree as far as the congressional intent is concerned from the allotment statute, 25 U.S.C. § 357, at issue in *Nebraska Public Power*.

The Tribe argues *Nebraska Public Power* is distinguishable because the 1901 Act did not require tribal consent. Also, the Tribe argues that the 1904 and 1948 Acts are not separate and distinct because they both provide the same method of acquiring rights-of-way.

We find the Tribe's arguments unpersuasive. The fact that the 1901 Act did not require consent does not distinguish the *Nebraska Public Power* analysis as far as the congressional purpose of the 1948 Act with respect to earlier specific statutes is concerned. Moreover, while the 1901 and 1948 Acts provide the same method of acquiring a right-of-way, this does not mean applying the former negates application of the latter.

Since effect can be given to both the 1904 and the 1948 Acts, both should be applied. This gave the Tribe a

choice between either the 20-year term under the earlier statute or up to a 50-year term under the latter statute. The Tribe consented to a 50-year term. The term of years was controlled by both Acts and the Secretary did not exceed his authority in providing regulations allowing 50-year terms.

V.

We hold the term of years for the rights-of-way can be either 20 or 50 years. Since the Tribe consented to the 50-year term, the Secretary's regulations with respect to term of years are valid. The district court properly entered judgment for MPC and the Secretary. Consistent with our holding, we find the Tribe is not entitled to attorney's fees.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

The Blackfeet Indian Tribe,
Plaintiff,

v.

Montana Power Company, a Montana corporation; The United States of America; and Donald Paul Hodel, Secretary of Interior,
Defendants.

JUDGMENT
IN A
CIVIL CASE

Filed November 24, 1986

CASE NUMBER:
CV-83-219-GF

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Montana Power Company's motion for partial summary judgment be, and the same hereby is, GRANTED.

November 24, 1986
Date

LOU ALEKSICH, JR.
Clerk
Carol A. Henderson
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE BLACKFEET INDIAN TRIBE, *Plaintiff,*	)	
vs.	)	NO. CV-83-219-GF
MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD PAUL HODEL, SECRETARY OF INTERIOR, *Defendants.*	)	MEMORANDUM AND ORDER (Filed Nov. 24, 1986)

The above-entitled action is presently before the court on cross-motions for partial summary judgment. The Blackfeet Indian Tribe ("the Tribe") originally filed suit against the Montana Power Company ("MPC"), the United States, and the Secretary of the Interior ("the Secretary"), alleging various violations of oil and gas leases between the Tribe, as lessor, and MPC. The Tribe further alleges certain pipeline rights-of-way granted to MPC have expired and, therefore, MPC's continued use of the rights-of-way constitutes a trespass. The cross-motions for summary judgment address the sole issue of whether the rights-of-way have expired. Jurisdiction vests with this court pursuant to 28 U.S.C. § 1362.

FACTS

The Secretary granted MPC five pipeline rights-of-way across the Tribe's land between the years 1961 and 1969. The Tribe consented to each right-of-way as evi-

denced by various tribal resolutions. Furthermore, each right-of-way was approved by the Secretary pursuant to the Act of February 5, 1948, 25 U.S.C. §§ 323-328, for a term of 50 years.

The Tribe first objected to these rights-of-way on April 28, 1981, when it passed a resolution asserting the rights-of-way granted MPC were only for a term of 20 years. The Tribe claims the Act of March 11, 1904, 25 U.S.C. § 321 ("1904 Act"), established 20 year terms for pipeline rights-of-way and, therefore, the Secretary exceeded his authority in granting 50 year rights-of-way to MPC. Furthermore, the Tribe believes, based on its interpretation of the applicable statutes, that the various rights-of-way granted MPC have expired and MPC's continued use of them constitutes a trespass.

On the other hand, MPC submits it expressly applied for and was granted 50 year rights-of-way by the Tribe's Superintendent. MPC relies on the Act of February 5, 1948, 25 U.S.C. §§ 323-328 ("1948 Act"), which does not set any specific term of years for rights-of-way.

DISCUSSION

The primary issue before the court is whether the Secretary, or his delegate, had the authority to grant a 50-year pipeline right-of-way. In resolving this issue, the court must decide whether the 1904 Act or the 1948 Act governs rights-of-way across Indian lands.

The Secretary, prior to 1948, possessed authority under various special purpose access statutes to grant different types of easements across Indian lands. *Nebraska Public Power District v. 100.95 Acres of Land*, 540 F.Supp.

592, 597-598 (Neb. 1982). One such statute was the 1904 Act, which authorized the Secretary to grant rights-of-way for oil and gas pipelines across Indian lands. The 1904 Act specifically limits such rights-of-way to 20 year terms. 25 U.S.C. § 321.

In 1948, Congress enacted a comprehensive, general purpose right-of-way statute entitled "The Indian Right-Of-Way Act of 1948" ("1948 Act"). The 1948 Act empowered the Secretary to grant rights-of-way for all purposes over and across Indian lands. 25 U.S.C. § 323. Furthermore, it set no limits on the term of any rights-of-way.

The 1948 Act was originally meant to simplify the granting of rights-of-way across certain Osage Indian lands in Oklahoma. S.Rep. No. 823, 80th Cong., 2nd Sess. 2 (1948). However, that Act was later amended to encompass rights-of-way across all Indian lands.

In expressing his support for the amended bill, Under Secretary of the Interior Oscar L. Chapman commented:

> It will go a long way to satisfy the need for simplification and uniformity in the administration of Indian law. At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that the right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.
>
> * * *
>
> When it is discovered that an application for a right-of-way may not be granted under existing statutory

> authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior. Very often as many as 15 to 20 individual Indians own undivided interests in 1 parcel of land and the signatures of all owners must be obtained. As a general rule these owners are widely scattered and frequently one or more of them are deceased and their heirs have not been determined. Thus, years may elapse before all of the owners' signatures can be obtained. As a practical matter, the burden of obtaining signatures to easement deeds falls on this Department and becomes a time and money consuming operation. In a great many cases the value and amount of land required for a right-of-way is very little and the cost to the United States in time and money is very high.

S.Rep. No. 823, 80th Cong., 2nd Sess. 3-4 (1948).

As discussed above, the 1948 Act was intended to simplify the means of acquiring rights-of-way over Indian lands. *Nebraska Public Power District v. 100.95 Acres of Land, supra,* 540 F.Supp. at 598; S.Rep. No. 823, 80th Cong., 2nd Sess. 3 (1948). However, the 1948 Act specifically refused to repeal any existing statutes empowering the Secretary to grant rights-of-way over Indian land. *See,* 25 U.S.C. § 326. In commenting on the proposed 1948 Act, Under Secretary of the Interior Chapman stated:

> In order to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new, provision has also been made in section 4 of the bill to preserve the existing statutory authority relating to rights-of-way over Indian lands. . . .

S.Rep. No. 823, 80th Cong., 2nd Sess. 4 (1948).

MPC cites Under Secretary Chapman's comments in support of its position that the 1948 Act created an independent statutory scheme for acquiring rights-of-way and not a scheme dependent upon other statutory authority, specifically the 1904 Act. MPC contends the 1948 Act addresses rights-of-way for all purposes and provides the Secretary broad authority to issue regulations implementing the Act, including the authority to regulate the term of rights-of-way. Because Congress did not repeal the 1904 Act, MPC submits that parties negotiating a right-of-way agreement can choose to be governed by the 1904 Act or the 1948 Act, depending on which Act they cite in the application. In the instant case, MPC applied for a 50-year right-of-way and received the same from the Secretary under the 1948 Act. Therefore, MPC asserts the Secretary did not exceed his authority and the 50-year right-of-way should be upheld.

On the other hand, the Tribe maintains the two Acts combine to create one scheme governing pipeline rights-of-way with the 1904 Act establishing the term of years. According to the Tribe, the 1904 Act provides the specific terms of the right-of-way and the 1948 Act provides the more general terms in addition to filling the gaps where existing right-of-way legislation was inadequate. Therefore, the Tribe asserts that the 1904 Act, being specifically preserved by the 1948 Act, establishes a 20-year term for MPC's pipeline rights-of-way.

A careful reading of the 1904 and 1948 Acts, together with their legislative histories, leads this court to conclude the two Acts create separate and independent means of acquiring rights-of-way across Indian lands. In enacting

the 1948 Act, Congress did not specifically require the 1904 and 1948 Acts be jointly construed to establish the terms and conditions for oil and gas pipeline rights-of-way. Furthermore, Congress did not specifically exclude oil and gas pipeline rights-of-way from the 1948 Act.

The plain language of the 1948 Act gives the Secretary authority "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe. . . ." 25 U.S.C. § 323. One condition the Secretary could reasonably prescribe in granting rights-of-way under 25 U.S.C. § 323 is the term of such rights-of-way. Furthermore, when the rights-of-way at issue were granted, the Department of the Interior's administrative regulations permitted 50-year terms for oil and gas pipeline rights-of-way. 25 C.F.R. § 161.19 (1960). Therefore, in granting MPC 50-year rights-of-way, the Secretary was merely exercising the power Congress had bestowed upon him.

Finally, Under Secretary Chapman's comment that the earlier right-of-way statutes were being preserved "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new,"[1] is indicative of Congress' intent in enacting the 1948 Act. The court concludes Congress intended to create a separate and independent means of acquiring rights-of-way, and not a means dependent on the earlier 1904 Act.

The Tribe further alleges that the more specific 1904 Act should govern the more general 1948 Act. In evaluating a statute, the test is the manifested intention of Congress, and not whether the statute is general or specific. *Nicodemus v. Washington Water Power Company*, 264

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[1]S Rep. No. 823, 80th Cong., 2nd Sess. 4 (1948).

F.2d 614, 617 (9th Cir. 1959). In the instant case, the Tribe's argument fails because Congress clearly manifested its intent that the 1948 Act empowers the Secretary to grant rights-of-way for all purposes.

The 1904 and 1948 Acts represent separate and independent means of acquiring rights-of-way. In the instant case, the parties expressly agreed to 50-year rights-of-way under the 1948 Act. In approving those rights-of-way, the Secretary did not exceed his authority under the 1948 Act.

For the reasons cited herein,

The court concludes the rights-of-way granted MPC by the Tribe were for a (sic) terms of 50 years. Therefore,

IT IS HEREBY ORDERED that MPC's motion for partial summary judgment be, and the same hereby is, GRANTED, and the Tribe's motion for partial summary judgment is DENIED.

DATED this 24 day of November, 1986.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE,	)	
Plaintiff-Appellant,	)	NO. 87-3697
vs.	)	CV-83-219-GF
THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior,	)	(Filed March 31, 1988)
Defendants-Appellees.	)	

APPEAL from the United States District Court for the GREAT FALLS District of MONTANA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the GREAT FALLS District of MONTANA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered FEB 24, 1988.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE, *Plaintiff-Appellant,* v. THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior, *Defendants-Appellees.*	NO. 87-3697 D.C. No. 83-219-GF ORDER (Filed March 21, 1988)

Before: WRIGHT, ANDERSON, and SCHROEDER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is DENIED.

The Act of March 11, 1904, 33 Stat. 65 (codified as amended at 25 U.S.C. § 321 (1982)) provides:

> CHAP. 505.—An Act Authorizing the Secretary of the Interior to grant right of way for pipe lines through Indian lands.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. [No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior]:[5] *Provided,* That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all

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5 Amended in 1917 to read: "Before title to rights-of-way applied for hereunder shall vest, maps of definite location shall be filed with and approved by the Secretary of the Interior: Provided, That before such approval the Secretary of the Interior may, under such rules and regulations as he may prescribe, grant temporary permits revocable in his discretion for the construction of such lines."

other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further,* That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements can not be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and case: *Provided,* That the rights herein granted shall not extend beyond a period of twenty years: *Provided further,* That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the ex-

piration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this Act is expressly reserved.

The Act of February 5, 1948, 62 Stat. 17 (codified at 25 U.S.C. §§ 323-328 (1982)) provides:

AN ACT

To empower the Secretary of the Interior to grant rights-of-way for various purposes across lands of individual Indians or Indian tribes, communities, bands or nations.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That the Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

SEC. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of

the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

SEC. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

SEC. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed hereby.

SEC. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

SEC. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

SEC. 7. This Act shall not become operative until thirty days after its approval.

STATEMENT OF ISSUES PRESENTED

1. Whether the term for oil and gas pipeline rights-of-way across Indian lands is governed by the Act of March 11, 1904, 33 Stat. 65, 25 U.S. [sic] § 321, or the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328.

2. Whether the Secretary of the Interior exceeded his authority under the Act of February 5, 1948, 25 U.S.C. §§ 323-328, by providing fifty-year terms for pipeline rights-of-way in contravention of the Act of March 11, 1904, 25 U.S.C. § 321.

(3)

No. 87-2108

In the Supreme Court of the United States

OCTOBER TERM, 1988

BLACKFEET INDIAN TRIBE, PETITIONER

v.

THE MONTANA POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Act of February 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. 323 *et seq.*, authorized the Secretary of the Interior, with the consent of the Blackfeet Tribe, to grant pipeline rights-of-way over tribal land for a term of 50 years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 838 F.2d 1055. The opinion of the district court (Pet. App. 12-18) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19) was entered on February 24, 1988. A petition for rehearing was denied on March 21, 1988 (Pet. App. 20). The petition for a writ of certiorari was filed on June 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the 1960s, the Secretary of the Interior (Secretary) granted the Montana Power Company five rights-of-way for pipelines across lands on the Blackfeet

Indian Reservation in Montana. The Blackfeet Indian Tribe (Tribe) consented to the rights-of-way; each had a term of 50 years. The Secretary approved the rights-of-way under the Act of February 5, 1948, 25 U.S.C. 323 *et seq.* (1948 Act).[1] In 1983, the Tribe filed suit against the Montana Power Company and the Secretary, alleging that the rights-of-way were limited to 20 years under the Act of March 11, 1904, 25 U.S.C. 321 (1904 Act),[2] and that the Secretary had exceeded his authority in approving rights-of-way for longer terms. The Tribe thus contended that the Montana Power Company's use of the pipelines after expiration of 20 years amounted to a trespass. Pet. App. 2-3, 12-13.

On cross-motions for partial summary judgment, the United States District Court for the District of Montana held that the Secretary had properly approved the rights-of-way for a term of 50 years (Pet. App. 12-17). The court observed that "the 1948 Act was intended to simplify the means of acquiring rights-of-way over Indian lands" (*id.* at 15) and that "[t]he plain language of the 1948 Act" (*id.* at 17) authorized the Secretary to approve 50-year rights-of-way. The 1904 and 1948 Acts "represent[ed] separate and independent means of acquiring rights-of-way" (*id.*

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[1] The 1948 Act empowered the Secretary "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands • • • held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations • • •" (25 U.S.C. 323). The Act did not limit the duration of a right-of-way. Under the governing regulation in effect when the Secretary approved the rights-of-way, a right-of-way could not exceed a term of 50 years. See 25 C.F.R. 161.19 (1960).

[2] The 1904 Act authorized the Secretary to grant rights-of-way for oil and gas pipelines over Indian lands. Such rights-of-way were limited to a period of 20 years. The Secretary, however, could grant extensions for a period of 20 years. See 25 U.S.C. 321.

at 18). Accordingly, the earlier statute's 20-year limitation did not control. The court found that "the parties expressly agreed to 50-year rights-of-way under the 1948 Act," and concluded that the Secretary, in approving these rights-of-way, had not exceeded his authority under the 1948 Act (*ibid.*).

2. The court of appeals affirmed (Pet. App. 1-10). "Since effect can be given to both the 1904 and 1948 Acts, both should be applied. This gave the Tribe a choice between either the 20-year term under the earlier statute or up to a 50-year term under the latter statute. The Tribe consented to a 50-year term. The term of years was controlled by both Acts and the Secretary did not exceed his authority in providing regulations allowing 50-year terms" (*id.* at 9-10).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner renews the contention (Pet. 6-10) that, despite the language of the 1948 Act, 25 U.S.C. 323, the statute does not authorize the Secretary to approve rights-of-way for a period exceeding 20 years. This Court has long recognized, however, that "[t]here is * * * no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Section 1 of the 1948 Act, 25 U.S.C. 323, unambiguously provides that "the Secretary of the Interior * * * is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands * * * held in trust by the United States for individual Indians or

Indian tribes, communities, bands, or nations * * *." The statute contains no suggestion that a right-of-way must be limited to a period of 20 years. By its terms, the Secretary can approve rights-of-way "subject to such conditions as he may prescribe"; and one such condition that he had prescribed at the time pertinent here was that the grant may be for a 50-year term. See 25 C.F.R. 161.19 (1960).[4]

The legislative history confirms the straightforward meaning of the 1948 Act. Congress enacted the statute to strengthen the Department of the Interior's ability to grant rights-of-way across Indian lands for any legitimate purpose. See S. Rep. 823, 80th Cong., 2d Sess. (1948). An "explanation of the [statute's] purposes" (*id.* at 2) was set forth in the Department of the Interior's letter to the Senate (*id.* at 3-4):

> [The proposed legislation] will go a long way to satisfy the need for simplification and uniformity in the administration of Indian law. At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that the right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.
>
> * * * * *

---

[4] The Secretary must first obtain permission from tribes such as the Blackfeet Indian Tribe, organized under the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, before granting a right-of-way across tribal land. See 25 U.S.C. 324.

> The proposed legislation would vest in the Secretary of the Interior authority to grant rights-of-way of any nature over the Indian lands described in the bill.
>
> * * * * *
>
> In order to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new, provision has also been made in section 4 of the bill to preserve the existing statutory authority relating to rights-of-way over Indian lands.

Congress thus intended to give the Secretary the ability to grant rights-of-way with whatever restrictions and conditions he determines are appropriate in light of his trust responsibilities to the Indians. At the same time, Congress no longer required the Secretary to base his authority on any one of a number of previous statutes, including the 1904 Act. Congress chose not to repeal the earlier statutes to avoid any confusion. By doing so, however, Congress certainly had no intention of limiting the Secretary's newly-expanded authority to grant rights-of-way.

Moreover, the Secretary has consistently interpreted the 1948 Act as not automatically incorporating the restrictions in previous rights-of-way statutes such as the 1904 Act's 20-year limitation. See, *e.g.*, 25 C.F.R. 161.19 (1960) (50-year term for all oil and gas pipeline rights-of-way); Intent to Rescind Portions of Regulations Governing Granting of Rights-of-Way Over Indian Lands, 46 Fed. Reg. 22205 (1981) ("In 1948 * * * Congress gave the Department comprehensive authority to grant rights-of-way for any purpose or any term of years and without the antiquated restrictions of the older statutes. The Bureau of Indian Affairs, however, has continued to apply the old restrictions even though it is no longer required to do so.

The rescission of these regulations would end that practice."); Proposed Rule, 51 Fed. Reg. 1391 (1986) (same). Instead, the Secretary retains the authority to prescribe conditions of such rights-of-way. Thus, the Secretary's current regulation, 25 C.F.R. 169.25(a) (1987), specifies that "[e]xcept when otherwise determined by the Secretary, rights-of-way granted * * * under the Act of February 5, 1948 * * * shall also be subject to [the 20-year term of the 1904 Act]." Of course, the Secretary's decison now to adopt as a matter of policy the 1904 Act's 20-year limitation as the norm is entirely consistent with Congress's intention of not mandating such a limitation in the 1948 Act. Accordingly, the court of appeals here properly deferred to the Secretary's reasonable and correct reading of the statutory provisions he administers. *E.g., Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).[5]

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[5] Contrary to petitioner's contention (Pet. 13-14), the decision below does not conflict with *Plains Elec. Generation & Transmission Co-op.* v. *Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976). In *Plains Electric*, the Tenth Circuit considered whether the Act of May 10, 1926, ch. 282, 44 Stat. 498, which permitted the condemnation of Pueblo Indian land under state law, had been repealed by later legislation, including the 1948 Act governing rights-of-way. The court held that the Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 U.S.C. 322, which made the Pueblo Indians subject to the general laws regarding rights-of-way over tribal land, together with the 1948 Act, superseded the 1926 statute because that statute had not required the consent of the tribe or the Secretary before lands were condemned. In other words, the court of appeals concluded that the earlier statute was flatly inconsistent with the protection afforded to the Indians in the later statutes. See 542 F.2d at 1376-1381. The *Plains Electric* court had no occasion to consider the relationship between the 1948 Act and earlier right-of-way statutes such as the 1904 Act.

Finally, petitioner argues (Pet. 10-12) that the court of appeals erred in concluding that the Tribe had consented to 50-year terms for the

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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rights-of-way. Both the district court and the court of appeals found that the Tribe had consented to the 50-year terms. See Pet. App. 2, 13, 18. It has long been this Court's practice, absent extraordinary circumstances, not to disturb concurrent factual findings by an appellate court and a trial court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 86-1626 (June 19, 1987), slip op. 7-8; *Graver Tank & Mfg.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). There is no reason to depart from that practice in this case.

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No. 87-2108

In The
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October Term, 1988

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vs.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. This Case Raises A Legal, Not A Factual, Question

As indicated in the Question Presented in our Petition for Certiorari, this case presents the issue of the proper term for oil and gas pipeline rights-of-way across Indian lands where there are two statutes on the subject: the Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. 321, (the 1904 Act), which specifies a maximum twenty-year term; and the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323-328, (the 1948 Act), which does not specify a term, but which does preserve the 1904 Act. *See* section 4 of the 1948 Act, 25 U.S.C. 326. The Secretary takes the position that he can grant rights-of-way under the 1948 Act for any term, unconstrained by the 1904 Act. The Blackfeet Tribe maintains that the Secretary is constrained by the 1904 maximum term even if the grant is made under the 1948 Act because the 1948 Act specifically preserves the 1904 Act.

The proper relationship of the two Acts is important for every oil and gas pipeline which has been granted across Indian lands, and for every grant which will be made in the future. The issue affects the negotiation, compensation and the proper conditions of a pipeline right-of-way grant. As long as the relationship between the statutes is unclear, there will be continuing uncertainty and confusion in the granting of pipeline rights-of-way and other kinds of rights-of-way. *See* n.1 *infra.*

The Court of Appeals held that the 1904 and 1948 Acts are separate and independent statutes, and that the Tribe could choose either a twenty year term under the

1904 Act or a fifty year term under the 1948 Act. This interpretation flies directly in the face of the purpose of the 1948 Act "to satisfy the need for simplification and uniformity in the administration of Indian law." S.Rep. 823, 80th Cong., 2d. Sess. 3-4 (1948). Rather than simplification and uniformity, the Court of Appeals decision causes confusion and uncertainty about the terms and conditions of all oil and gas pipeline right-of-way grants.[1] It is much more reasonable to construe the statutes as an integrated right-of-way scheme. *See Plains Electric Gen. and Tr. Co-op. v. Pueblo of Laguna*, 542 F.2d 1375, 1380-81 (10th Cir. 1976).

The Secretary's regulations under either statute must be consistent with the law as expressed in both the 1904 and 1948 Acts, *Dixon v. United States*, 381 U.S. 68, 74 (1975); *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983); *Loma Linda University v. Schweiker*, 705 F.2d 1123, 1126 (9th Cir. 1983), especially if the later 1948 Act preserves the earlier 1904 Act. Congress would not preserve the twenty-year maximum term on the one hand and allow the Secretary to violate that term by regulation on the other hand. The 1948 Act authorizes the Secretary to prescribe conditions for rights-of-way, but the author-

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[1] Four other existing right-of-way statutes were also preserved by section 4 of the 1948 Act: Act of Mar. 3, 1901, 31 Stat. 1084, 25 U.S.C. 311 (Opening of highways); Act of Mar. 2, 1899, 30 Stat. 990, 25 U.S.C. 312-318 (Rights-of-way for railway, telegraph & telephone lines); Act of Mar. 3, 1901, 31 Stat. 1083, 25 U.S.C. 319 (Rights-of-way for telephone & telegraph lines [Oklahoma]); Act of Mar. 3, 1909, 35 Stat. 781, 25 U.S.C. 320 (Rights-of-way for reservoirs or materials). Thus the Court of Appeals decision potentially causes confusion and uncertainty as to the terms and conditions of each of these various kinds of rights-of-way.

ity bestowed on the Secretary is not the power to ignore or violate other laws which Congress has preserved in the same statute.[2]

The Court of Appeals chose to focus on the factual issue of the term of years consented to by the Tribe to determine the validity of the fifty-year term.[3] We believe the court's focus was in error, and in any case, the Court relied on a fact not supported by the record, *see* Part II of the Tribe's Petition for Certiorari. Therefore, this is another reason for this Court to review the Court of Appeals' decision.

Montana Power Company argues that the Tribe raises the consent issue for the first time. However, the Tribe argued in both the District Court and the Court of Appeals that the Tribe did not consent to a fifty-year term, and in any case, it could not make an invalid term valid merely by its consent. It is true that the issue was never the focus of any of the parties' arguments nor the decision of the District Court, reprinted at Appendix 12-18. It was the Court of Appeals which relied on the consent

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[2] At a minimum, the 1904 Act exists as a qualification to the 1948 Act as to the term of years for pipeline rights-of-way. *See Sutherland Statutory Construction* 23.15 (4th ed.) ("[w]here the later general statute does not present an irreconcilable conflict, the prior special statute will be construed as remaining in effect as a qualification of or exception to the general law"); *Stewart v. United States,* 106 F.2d 405, 409 (9th Cir. 1939) ("the fact that one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general.")

[3] In fact, the Court of Appeals seems to have held that the Tribe's consent validated the fifty-year term: "Since the Tribe consented to the 50-year term, the Secretary's regulations with respect to terms of years are valid." Appendix at 10.

issue as the basis for its decision, thereby elevating an irrelevant issue to an unwarranted importance. In fact, the Tribe's consent or non-consent has no bearing on the proper interpretation of the 1904 and 1948 Acts. Because the Court of Appeals relied on an irrelevant fact for the linchpin of its decision, however, this Court ought to review and reverse the decision.[4]

II. The Secretary Has Consistently Required A Twenty-Year Maximum Term Except For The Eight-Year Period When The Rights-Of-Way At Issue Were Granted

The Secretary has required a twenty-year term limitation for oil and gas pipeline rights-of-way since the 1948 Act was enacted, except for the brief period between 1960 and 1968 when the rights-of-way at issue were granted. *See e.g.* 25 C.F.R. 256.19 (1951); 25 C.F.R. 161.25(a) and (b) (1968). Twenty-year maximum terms are required even now. 25 C.F.R. 169.25(a) and (b) (1987). Thus, the

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[4] Because the Tribe did not consent to fifty-year terms, the necessary informed consent required under the 1934 Indian Reorganization Act, 25 U.S.C. 476, is lacking. In addition, if the term is fifty years rather than twenty years, then the adequacy of the compensation is questionable. The Tribe has indicated all along that no monetary compensation was received for any of the rights-of-way at issue. The bonuses and royalties referred to by Montana Power in their Brief in Opposition at 2 are compensation for the oil and gas leases between the Tribe and MPC and are not compensation for the pipeline right-of-way. The Tribe does not ask the Court to review this issue or the consent issue except to suggest that if these questions of fact are relevant at all, they should be remanded for adequate fact-finding. However, we note that Montana Power Company obtained a very significant benefit from the Blackfeet Tribe for virtually no compensation. Montana Power's benefit is substantially enhanced, and the Tribe's detriment greatly increased, if the benefit extends for fifty years rather than twenty years.

Secretary's regulations consistently have been in conformity with the 1904 Act.

The Secretary now says that even though twenty-year maximum terms have been consistently required, the Secretary has always considered that he had authority to provide for longer terms. This is a convenient after-the-fact explanation. The Bureau of Indian Affairs has twice proposed longer terms, *see* 46 Fed. Reg. 22205 (1981); 51 Fed. Reg. 1391 (1986), but these regulations were never adopted as final. What the Secretary has actually adopted is more indicative of his position on the proper term than what has been proposed by the BIA but never adopted.

CONCLUSION

For the above reasons and the reasons set out in the Tribe's Petition for Certiorari, the Petition for Certiorari should be granted.

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